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17 UNITED STATES DISTRICT COURT
18 CENTRAL DISTRICT OF CALIFORNIA

19 LOS ANGELES TURF CLUB,
20 INCORPORATED, a California
21 Corporation, *et al.*,

22 Plaintiffs,

23 vs.

24 HORSE RACING LABS, LLC, a
25 Delaware Limited Liability
26 Company (a/k/a IMMERSE, LLC),
27 d/b/a DERBYWARS, and DOES 1
28 through 10, inclusive,

Defendants.

No. 2:15-cv-09332-SJO (JEMx)

Honorable S. James Otero
Courtroom No. 10C

**DEFENDANT HORSE RACING LABS,
LLC'S MEMORANDUM OF
CONTENTIONS OF FACT AND LAW**

FAC Filed: May 16, 2016
Fact Discovery Cutoff: March 27, 2017
Expert Discovery Cutoff: April 10, 2017
Final Pretrial Conf.: June 19, 2017
Trial Date: June 27, 2017

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Pursuant to Local Rule 16-4, Defendant Horse Racing Labs, LLC (“Derby Wars”) submits the following Memorandum of Contentions of Fact and Law in advance of the Final Pretrial Conference. Derby Wars expressly reserves its right to submit an Amended Memorandum of Contentions of Fact and Law in advance of trial, or otherwise supplement, amend, modify, and/or withdraw any of the defenses, authorities, and/or legal positions asserted herein.

I. INTRODUCTION

This litigation relates to a dispute between Derby Wars, a horse racing fantasy contest site launched in October 2011, and Plaintiffs Los Angeles Turf Club, Inc., Los Angeles Turf Club II, Inc., Pacific Racing Association, Pacific Racing Association, II, Gulfstream Park Racing Association, Inc., Oregon Racing, Inc., Maryland Jockey Club of Baltimore City, Inc., and Laurel Racing Association, Inc. (collectively, “Plaintiffs”), a collective of horse racing tracks that operate horse racing events in California, Florida, Oregon, and Maryland. In their First Amended Complaint (“FAC”), Plaintiffs allege that Derby Wars’ fantasy contests, in using the publicly available race results of horse races at Plaintiffs’ tracks in Derby Wars’ contests, violate the Interstate Horse Racing Act of 1978 (“IHA”). Additionally, Plaintiffs allege that Derby Wars’ conduct constitutes unfair competition in violation of California Business & Professions Code sections 17200, *et seq.*, (“UCL”).

In its Answer to the FAC, Derby Wars contends that Plaintiffs’ IHA claim is barred by the IHA’s three-year statute of limitation. Additionally, Derby Wars respectfully maintains that the IHA does not apply to Derby Wars’ fantasy horseracing contests because the contests do not constitute bets or wagers (and instead constitute contests), and that such contests are games of skill that fall within the Fantasy Sports exception of the Unlawful Internet Gambling Act of 2006, 31 U.S.C. § 5361 *et seq.* (“UIGEA”).¹ Derby Wars further contends that Plaintiffs do

¹ Derby Wars respectfully disagrees with the Court’s determination of whether its

1 not have standing to assert their UCL claim. Derby Wars asserts that Plaintiffs'
 2 claims fail and they are not entitled damages based on Derby Wars' waiver,
 3 estoppel, unclean hands, and statute of limitations affirmative defenses, among
 4 other defenses.

5 Plaintiffs initiated this lawsuit on December 2, 2015, alleging four causes of
 6 action: (1) violation of the IHA; (2) violation of the Racketeering Influence and
 7 Corruption Act ("RICO"), 18 U.S.C. § 1961 *et seq.*; (3) violation of the UCL; and
 8 (4) Intentional Interference with Prospective Economic Advantage. (Docket No. 1)
 9 Derby Wars filed a motion to dismiss, or in the alternative, to strike the second and
 10 forth causes of action in Plaintiffs' Complaint. (Docket No. 23.) The Court
 11 granted the motion in part, finding that Plaintiffs had not alleged sufficient facts to
 12 establish causation under RICO or that Derby Wars intentionally interfered with
 13 Plaintiffs' prospective business advantage. (Docket No. 30.)

14 Plaintiffs filed their First Amended Complaint ("FAC") on May 16, 2016,
 15 alleging two causes of action: (1) violation of the IHA and (2) violation of the UCL.
 16 (Docket No. 31.) Derby Wars filed a motion for judgment on the pleadings, which
 17 the Court granted with respect to disgorgement of Plaintiffs' alleged damages and
 18 denied with respect to Plaintiffs' IHA and UCL Claims. (Docket No. 43.) ("MJOP
 19 Order"). In the MJOP Order, the Court found that Plaintiffs are not entitled to seek
 20 restitution under the UCL.

21 The parties filed their respective cross-motions for summary judgment and
 22 partial summary judgment on March 20, 2017. (Docket Nos. 62, 63.) On May 15,
 23 2017, the Court issued its ruling on the cross-motions (the "MSJ Order"), granting
 24 in part Plaintiffs' Motion for Partial Summary Judgment, and denying Derby Wars'

25 contests and/or entry fees constitute wagers, and that it operates an off-track betting
 26 system, and expressly reserves its rights to challenge such determinations and offer
 27 contrary evidence in subsequent proceedings, including, without limitation, on
 28 appeal. However, given the Court's ruling on the parties' motions for summary
 judgment, Derby Wars recognizes that the Court will not permit it to relitigate these
 issues at trial.

1 Motion for Summary Judgment. (Docket No. 88.)

2 Derby Wars' contentions regarding Plaintiffs' remaining claims and Derby
3 Wars' affirmative defenses are detailed below.

4 **II. CLAIMS AND DEFENSES RE: PLAINTIFFS' FIRST AMENDED
COMPLAINT**

5 **A. Plaintiffs' Claim for Violation of the IHA**

6 a. Summary Statement of Plaintiffs' Claim

7 Plaintiffs claim that Derby Wars' fantasy horse racing contests constitute
8 "wagers" within the meaning of the IHA, and that Derby Wars is operating an off-
9 track betting system subject to the IHA. Plaintiffs claim that Derby Wars accepts
10 interstate off-track wagers in violation of the IHA. (Docket No. 31, ¶¶ 53-61.)

11 b. Elements Required to Establish Claim

12 To establish a right to recovery under the IHA, Plaintiffs must establish by a
13 preponderance of evidence that Defendant accepted an interstate off-track wager
14 without consent from the host racing association, the host racing commission, and
15 the off-track racing commission. 15 U.S.C. § 3004. Although the Court has
16 already ruled that Derby Wars' conduct violates the IHA, Plaintiffs must
17 demonstrate that they are entitled to damages and a permanent injunction.

18 The IHA provides: "Any person accepting any interstate off-track wager in
19 violation of this chapter shall be civilly liable for damages to the host State, the host
20 racing association and the horsemen's group. Damages for each violation shall be
21 based on the total of off-track wagers as follows: (1) If the interstate off-track
22 wager was of a type accepted at the host racing association, damages shall be in an
23 amount equal to that portion of the takeout which would have been distributed to
24 the host State, host racing association and the horsemen's group, as if each such
25 interstate off-track wager had been placed at the host racing association. (2) If such
26 interstate off-track wager was of a type not accepted at the host racing association,
27 the amount of damages shall be determined at the rate of takeout prevailing at the

1 off-track betting system for that type of wager and shall be distributed according to
2 the same formulas as in paragraph (1) above.” 15 U.S.C. § 3005.

3 The IHA also provides that Plaintiffs may seek injunctive relief: “The host
4 State, the host racing association, or the horsemen’s group may commence a civil
5 action against any person alleged to be in violation of this chapter, for injunctive
6 relief to restrain violations and for damages in accordance with section 3005 of this
7 title.” 15 U.S.C. § 3006(a). The elements Plaintiffs must establish to obtain
8 permanent injunctive relief for this claim are: (1) that Plaintiffs have suffered an
9 irreparable injury; (2) that remedies available at law, such as monetary damages,
10 are inadequate to compensate for that injury; (3) that, considering the balance of the
11 hardships between Plaintiffs and Derby Wars, a remedy in equity is warranted; and
12 (4) that the public interest would not be disserved by a permanent injunction. *La*
13 *Quinta Worldwide LLC v. Q.R.T.M., S.A. de C.V.*, 762 F.3d 867, 879 (9th Cir.
14 2014); *Allergan, Inc. v. Athena Cosmetics, Inc.*, No. SACV071316 JVS RNBX,
15 2013 WL 12142655, at *2 (C.D. Cal. Mar. 6, 2013).

16 c. Key Evidence in Opposition to Plaintiffs’ Claim

17 The following is a representative (not an exhaustive list) of key evidence that
18 Derby Wars will use to demonstrate that Plaintiffs are not entitled to damages or
19 injunctive relief based upon their IHA claim at trial.

20 • Testimony of Mark Midland;
21 • Testimony of Michael Shutty;
22 • Testimony of Scott Daruty;
23 • Testimony of Timothy Ritvo;
24 • Testimony of Michael Rogers;
25 • Testimony of John Ford;
26 • Testimony of Joe Morris;
27 • Testimony of Nate Newby;
28 • Testimony of Andrew Arthur;

- 1 • Testimony of Eric Sindler;
- 2 • Testimony of Michael Calderone;
- 3 • Testimony of Gregory Avioli;
- 4 • Testimony of Ed Comins;
- 5 • Testimony of Chris Schick;
- 6 • Testimony of Rick Baedeker;
- 7 • Plaintiffs' responses to interrogatories;
- 8 • Documents and communications between Plaintiffs' and the Stronach
- 9 Group's representatives and agents, on the one hand, and Derby Wars'
- 10 representatives and agents, on the other hand, regarding business
- 11 dealings and relationships with Plaintiffs and the Stronach Group;
- 12 • Documents and communications between Plaintiffs' and the Stronach
- 13 Group's representatives and agents, on the one hand, and Derby Wars'
- 14 representatives and agents, on the other hand, regarding cross
- 15 marketing efforts between Plaintiffs and Derby Wars;
- 16 • Documents and communications between Plaintiffs, on the one hand,
- 17 and Derby Wars and/or the Stronach Group and/or third parties, on the
- 18 other hand, and internally amongst Plaintiffs, evidencing that despite
- 19 their awareness of Derby Wars' fantasy horse racing contests as early
- 20 as September 2011, Plaintiffs never objected to Derby Wars' conduct
- 21 prior to the filing of this action;
- 22 • Documents regarding the financial aspects of Derby Wars' contests
- 23 and revenues;
- 24 • Documents regarding wagering on horse racing and operation of
- 25 Plaintiffs' racetracks;
- 26 • Plaintiffs' licenses to operate race tracks and accept wagers on horse
- 27 races;
- 28 • Plaintiffs' agreements with the horsemen's groups and host race states;

- 1 • Agreements between Plaintiffs and third parties, including
2 simulcasting and Advanced Deposit Wagering (“ADW”) agreements,
3 regarding horse wagering;
- 4 • Documents and communications regarding Plaintiffs’ and/or the
5 Stronach Group’s business dealings and agreements with other fantasy
6 horse racing and/or handicapping contest sites;
- 7 • Documents regarding the financial aspects of Plaintiffs’ and/or the
8 Stronach Group’s business dealings and agreements with other fantasy
9 horse racing and/or handicapping contest sites;
- 10 • Documents and communications regarding Plaintiffs’ interactions with
11 state horse racing boards and commissions and state legislatures,
12 including specifically the California Horse Racing Board (“CHRB”);
- 13 • Documents and communications regarding Plaintiffs’ and/or the
14 Stronach Group’s purported damages in this action;
- 15 • Documents and communications regarding Plaintiffs’ decision to file
16 this lawsuit.

17 **B. Plaintiffs’ Claim for Violation of the UCL**

18 a. Summary Statement of Plaintiffs’ Claim

19 Plaintiffs claim that Derby Wars’ fantasy horse racing contests violate
20 California Business & Professions Code sections 17200, *et seq.* (Docket No. 31 ¶¶
21 62-67.)

22 b. Elements Required to Establish Claim

23 To establish a right to recovery under their UCL claim, Plaintiffs must prove
24 by a preponderance of the evidence that:

25 (a) Defendant has engaged in one of the following “wrongs”: (1)
26 An unlawful business act or practice; (2) An unfair business act or practice; (3) A
27 fraudulent business act or practice; (4) An unfair, deceptive, untrue or misleading
28 advertising; *or* (5) Another act specifically prohibited by the UCL; *and*

1 (b) Plaintiffs have lost money or property sufficient to cause an
2 injury in fact (i.e., an economic injury); *and*

3 (c) Plaintiffs' economic injury was caused by the unfair
4 competition.

5 Cal. Bus. & Prof. Code § 17204; *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310,
6 317-20 (2011).

7 The UCL does not regulate parties or conduct unconnected to California, and
8 cannot be based on laws from any state other than California. *Norwest Mortg., Inc.*
9 *v. Superior Court*, 72 Cal. App. 4th 214, 225-27 (1999); *Sullivan v. Oracle Corp.*,
10 51 Cal. 4th 1191, 1206-09 (2011); *Washington Mut. Bank, FA v. Superior Court*, 24
11 Cal. 4th 906, 919-20 (2001).

12 Plaintiffs may seek only injunctive relief under this claim. (MJOP Order at
13 5.) To establish that they are entitled to a permanent injunction, Plaintiffs must
14 establish the following: The elements Plaintiffs must establish to obtain permanent
15 injunctive relief for this claim are: (1) that Plaintiffs have suffered an irreparable
16 injury; (2) that remedies available at law, such as monetary damages, are
17 inadequate to compensate for that injury; (3) that, considering the balance of the
18 hardships between Plaintiffs and Derby Wars, a remedy in equity is warranted; and
19 (4) that the public interest would not be disserved by a permanent injunction. *La*
20 *Quinta Worldwide LLC v. Q.R.T.M., S.A. de C.V.*, 762 F.3d 867, 879 (9th Cir.
21 2014); *Allergan, Inc. v. Athena Cosmetics, Inc.*, No. SACV071316 JVS RNBX,
22 2013 WL 12142655, at *2 (C.D. Cal. Mar. 6, 2013).

23 c. Key Evidence in Opposition to Plaintiffs' Claim

24 The following is a representative (not an exhaustive) list of key evidence that
25 Derby Wars will use to demonstrate that Plaintiffs are not entitled to an injunction
26 on their UCL claim, and to prove its affirmative defenses at trial.

27 • Testimony of Mark Midland;
28 • Testimony of Michael Shutty;

- 1 • Testimony of Scott Daruty;
- 2 • Testimony of Timothy Ritvo;
- 3 • Testimony of Michael Rogers;
- 4 • Testimony of John Ford;
- 5 • Testimony of Joe Morris;
- 6 • Testimony of Nate Newby;
- 7 • Testimony of Andrew Arthur;
- 8 • Testimony of Eric Sindler;
- 9 • Testimony of Michael Calderone;
- 10 • Testimony of Gregory Avioli;
- 11 • Testimony of Ed Comins;
- 12 • Testimony of Chris Schick;
- 13 • Testimony of Rick Baedeker;
- 14 • Testimony of Randal Heeb, Ph.D.;
- 15 • The Corrected Expert Report of Randal Heeb, Ph.D.;
- 16 • Plaintiffs' responses to interrogatories;
- 17 • Documents and communications between Plaintiffs' and the Stronach Group's representatives and agents, on the one hand, and Derby Wars' representatives and agents, on the other hand, regarding business dealings and relationships with Plaintiffs and the Stronach Group;
- 18 • Documents and communications between Plaintiffs' and the Stronach Group's representatives and agents, on the one hand, and Derby Wars' representatives and agents, on the other hand, regarding cross marketing efforts between Plaintiffs and Derby Wars;
- 19 • Documents and communications between Plaintiffs, on the one hand, and Derby Wars and/or the Stronach Group and/or third parties, on the other hand, and internally amongst Plaintiffs, evidencing that despite their awareness of Derby Wars' fantasy horse racing contests as early

1 as September 2011, Plaintiffs never objected to Derby Wars' conduct
2 prior to the filing of this action;

3 • Documents regarding the financial aspects of Derby Wars' contests
4 and revenues;

5 • Documents regarding wagering on horse racing and operation of
6 Plaintiffs' racetracks;

7 • Plaintiffs' licenses to operate race tracks and accept wagers on horse
8 races;

9 • Plaintiffs' agreements with the horsemen's groups and host race states;

10 • Agreements between Plaintiffs and third parties, including
11 simulcasting and ADW agreements, regarding horse wagering;

12 • Documents and communications regarding Plaintiffs' and/or the
13 Stronach Group's business dealings and agreements with other fantasy
14 horse racing and/or handicapping contest sites;

15 • Documents regarding the financial aspects of Plaintiffs' and/or the
16 Stronach Groups' business dealings and agreements with other fantasy
17 horse racing and/or handicapping contest sites;

18 • Documents and communications regarding Plaintiffs' interactions with
19 state horse racing boards and commissions and state legislatures,
20 including specifically the CHRB;

21 • Documents and communications regarding Plaintiffs' and/or the
22 Stronach Group's purported damages in this action; and

23 • Documents and communications regarding Plaintiffs' decision to file
24 this lawsuit.

1 **C. Derby Wars' Third Affirmative Defense – Statute of Limitations²**

2 a. Summary Statement of Defense

3 Plaintiffs are barred from bringing their IHA claim by the IHA's three-year
4 statute of limitations. Plaintiffs were aware of Derby Wars' fantasy horse racing
5 contests as early as September 2011. As Plaintiffs were aware of Derby Wars'
6 conduct before December 2012, over three years before filing the December 2,
7 2015 complaint, Plaintiffs' IHA claim is time barred and they are not entitled to
8 damages.

9 b. Elements Required to Establish Defense

10 The IHA provides: "A civil action may not be commenced pursuant to this
11 section more than 3 years after the discovery of the alleged violation upon which
12 such civil action is based." 15 U.S.C. § 3006(c).

13 The IHA, is a statute based on *accrual* rather than discovery. *Compare*
14 Copyright Act 17 U.S.C. §507(b) ("No civil action shall be maintained under the
15 provisions of this title unless it is commenced ***within three years after the claim***
16 ***accrued***"), with the IHA 15 U.S.C. §3006(c) ("A civil action may not be
17 commenced pursuant to this section ***more than 3 years after the discovery of the***
18 ***alleged violation upon which such civil action is based***"). Courts have held in
19 analogous contexts that the statutes of limitation begin to run anew only when the
20 defendant commits a ***new*** overt act that injures the plaintiff, or upon the discovery
21 of ***new*** facts not previously known. For example: (i) antitrust actions under the
22 Sherman Act (*see Pace Industries, Inc. v. Three Phoenix Co.*, 813 F.2d 234, 238
23 (9th Cir. 1987) (to restart the statute of limitations "a new and independent act that
24 is not merely a reaffirmation of a previous act" is required, which "inflict[s] new
25 and accumulating injury on the plaintiff")); (ii) actions for securities fraud under 17
26 C.F.R. 240.10b-5 (*see Allstate Ins. Co. v. Countrywide Financial Corp.*, 824

27 ² As set forth below, Derby Wars does not intend to proceed with its First, Second,
28 Fourth, Sixth, and Eighth Affirmative Defenses, as they are subsumed by other
 defenses or legal positions. *See* Section VIII below.

1 F.Supp.2d 1164, 1180 (C.D. Cal. 2011) (the analysis would have to generate new
2 facts not previously known (emphasis added)); and (iii) RICO actions under 18
3 U.S.C.A. §§ 1961 (*see Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 186-87 (1997)
4 (“last predicate act rule” does not apply, as it would “create[] a limitations period
5 that is longer than Congress could have contemplated”)). Accordingly, if Plaintiffs
6 discovered the alleged violation of the IHA on or before December 1, 2012, their
7 claims are time-barred.

8 Moreover, adding a “look back” period to a statute of limitation that already
9 includes tolling based on discovery contravenes the principle that “[w]here
10 Congress explicitly enumerates certain exceptions to a general prohibition,
11 additional exceptions are not to be implied.” *TRW Inc. v. Andrews*, 534 U.S. 19, 28
12 (2001) (citation omitted) (“Congress implicitly excluded a general discovery rule
13 by explicitly including a more limited one”). Plaintiffs’ reliance on *Petrella v.*
14 *Metro-Goldwyn-Mayer, Inc.*, 134 S.Ct. 1962 (2014) is misplaced. *Petrella* did not
15 hold, as Plaintiffs imply, that all statutes of limitation for all claims for relief would
16 thereafter have a “look-back” period. Courts since *Petrella* have confirmed its
17 narrow application to “accrual” statutes. *See, e.g., Consumer Health Info. Corp. v.*
18 *Amylin Pharm., Inc.*, 819 F.3d 992, 996 (7th Cir. 2016) (declining to apply look-
19 back to copyright ownership dispute); *CSL Silicones Inc. v. Midsun Grp, Inc.*, 170
20 F. Supp. 3d 304, 314 (D. Conn. 2016) (declining to apply look-back to trademark
21 infringement). Any broader application would contravene the principle that
22 limitations period are intended “to prevent plaintiffs from “sleeping on their rights.”
23 *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 352 (1983).

24 Finally, the continuing violation doctrine under California law does not
25 provide a basis for tolling the IHA statute, as it is inapplicable to these facts and
26 limited to serial or episodic misconduct, such as in hostile work environment. *See*
27 *Aryeh v. Canon Bus. Solutions, Inc.*, 55 Cal. 4th 1185, 1199-1200 (2013).
28 Equitable tolling doctrines only operate to prevent injustice to a plaintiff who did

1 not sleep on his rights. *See Burnett v. New York Cent. R. Co.*, 380 U.S. at 428-29.
2 “Limitations periods are intended to put defendants on notice of adverse claims and
3 to prevent plaintiffs from sleeping on their rights.” *Crown, Cork & Seal Co., Inc. v.*
4 *Parker*, 462 U.S. 345, 352 (1983); *see also Burnett v. New York Cent. R. Co.*, 380
5 U.S. 424, 428-29 (1965). Here, Plaintiffs slept on their rights and can point to no
6 new facts or overt acts that would restart the statute.

7 c. Key Evidence in Support of Defense

8 The following is a representative (not an exhaustive) list of key evidence that
9 Derby Wars will use to prove its affirmative defense at trial:³

- 10 • Testimony of Mark Midland;
- 11 • Testimony of Michael Shutty;
- 12 • Testimony of Scott Daruty;
- 13 • Testimony of Timothy Ritvo;
- 14 • Testimony of Michael Rogers;
- 15 • Testimony of John Ford;
- 16 • Testimony of Joe Morris;
- 17 • Testimony of Nate Newby;
- 18 • Testimony of Andrew Arthur;
- 19 • Testimony of Gregory Avioli;
- 20 • Testimony of Eric Sindler;
- 21 • Testimony of Michael Calderone;
- 22 • Testimony of Gregory Avioli;
- 23 • Testimony of Rick Baedeker;
- 24 • Documents and communications between Plaintiffs, on the one hand,
25 and Derby Wars and/or the Stronach Group and/or third parties, and

26
27 ³ With respect to all of Derby Wars’ affirmative defenses, Derby Wars anticipates
28 introducing testimony (live witnesses and, for unavailable witnesses, deposition
testimony) to substantiate their claims and defenses.

1 internally amongst Plaintiffs, establishing that Plaintiffs were aware of
2 Derby Wars' fantasy horse racing contests as early as September 2011,
3 well before December 2012;

4 • Documents and communications between Plaintiffs, on the one hand,
5 and Derby Wars and/or the Stronach Group and/or third parties, on the
6 other hand, and internally amongst Plaintiffs, evidencing that despite
7 their awareness of Derby Wars' fantasy horse racing contests as early
8 as September 2011, Plaintiffs never objected to Derby Wars' conduct
9 prior to the filing of this action;

10 • Agreements between Plaintiffs and third parties, including
11 simulcasting and ADW agreements, regarding horse wagering;

12 • Documents and communications establishing that licenses to conduct
13 ADW and simulcasting do not cover fantasy horse racing contests, and
14 do not treat fantasy contests as pari-mutuel wagering;

15 • Documents and communications between Plaintiffs' and the Stronach
16 Group's representatives and agents, on the one hand, and Derby Wars'
17 representatives and agents, on the other hand, regarding business
18 dealings and relationships with Plaintiffs and the Stronach Group;

19 • Documents and communications between Plaintiffs' and the Stronach
20 Group's representatives and agents, on the one hand, and Derby Wars'
21 representatives and agents, on the other hand, regarding cross
22 marketing efforts between Plaintiffs and Derby Wars; and

23 • Documents and communications regarding Plaintiffs' decision to file
24 this lawsuit.

25 **D. Derby Wars' Fifth Affirmative Defense - No Standing Under the**
26 **IHA**
27 a. Summary Statement of Defense

28 Plaintiffs lack standing to assert a claim under the IHA because Derby Wars

1 is not a licensed off-track betting system. Derby Wars respectfully disagrees with
2 the Court's determination that Derby Wars constitutes a licensed off-track betting
3 system. Derby Wars also contends that if Plaintiffs are entitled to damages under
4 the IHA, Plaintiffs produced no evidence that either the horsemen's groups or host
5 states have assigned to Plaintiffs their legal rights to pursue and collect any
6 purported damages on their behalf for violations of the IHA.

7 b. Elements Required to Establish Defense

8 The IHA provides a private right of action only against persons who
9 "accept[] any interstate off-track wager in violation of [the IHA]." 15 U.S.C. §
10 3005. An "interstate off-track wager" refers to a legal "wager" "accepted by an off-
11 track betting system." 15 U.S.C. § 3002(3). "Off track betting system" refers to
12 any group that accepts "wagers on horseraces at locations other than the place
13 where the horserace is run, which business is conducted by the State or licensed or
14 otherwise permitted by State law." 15 U.S.C. § 3002(7). Accordingly, the
15 definition of "interstate off track wager" is limited to wagers taken by businesses
16 *licensed* to do so.

17 Article III standing requires (1) an injury in fact; (2) causation; and (3)
18 redressability. *See Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 273
19 (2008). A plaintiff does not have standing to claim relief "on the legal rights or
20 interests of third parties." *Id.* at 290; *see also Warth v. Seldin*, 422 U.S. 490, 499
21 (1975). Only a legal assignee of another's legal interest may have standing to sue
22 on behalf of the assignor. *Sprint Commc'ns Co.*, 544 U.S. at 285.

23 c. Key Evidence in Support of Defense

24 The following is a representative (not an exhaustive list) of key evidence that
25 Derby Wars will use to prove its affirmative defense at trial.

26 • Testimony of Mark Midland;
27 • Testimony of Michael Shutty;
28 • Testimony of Scott Daruty;

- 1 • Testimony of Timothy Ritvo;
- 2 • Testimony of Michael Rogers;
- 3 • Testimony of John Ford;
- 4 • Testimony of Joe Morris;
- 5 • Testimony of Nate Newby;
- 6 • Testimony of Andrew Arthur;
- 7 • Testimony of Eric Sindler;
- 8 • Testimony of Michael Calderone;
- 9 • Testimony of Gregory Avioli;
- 10 • Testimony of Ed Comins;
- 11 • Testimony of Chris Schick;
- 12 • Testimony of Randal Heeb, Ph.D.;
- 13 • Testimony of Rick Baedeker;
- 14 • Plaintiffs' responses to interrogatories;
- 15 • Documents and communications between Plaintiffs' and the Stronach Group's representatives and agents, on the one hand, and Derby Wars' representatives and agents, on the other hand, regarding business dealings and relationships with Plaintiffs and the Stronach Group;
- 16 • Documents and communications between Plaintiffs' and the Stronach Group's representatives and agents, on the one hand, and Derby Wars' representatives and agents, on the other hand, regarding cross marketing efforts between Plaintiffs and Derby Wars;
- 17 • Documents and communications between Plaintiffs, on the one hand, and Derby Wars and/or the Stronach Group and/or third parties, on the other hand, and internally amongst Plaintiffs, evidencing that despite their awareness of Derby Wars' fantasy horse racing contests as early as September 2011, Plaintiffs never objected to Derby Wars' conduct prior to the filing of this action;

- 1 • Documents regarding the financial aspects of Derby Wars' contests
2 and revenues;
- 3 • Documents regarding wagering on horse racing and operation of
4 Plaintiffs' racetracks;
- 5 • Plaintiffs' licenses to operate racetracks and accept wagers on horse
6 races;
- 7 • Plaintiffs' agreements with the horsemen's groups and host race states;
- 8 • Agreements between Plaintiffs and third parties, including
9 simulcasting and ADW agreements, regarding horse wagering;
- 10 • Documents and communications regarding Plaintiffs' and/or the
11 Stronach Group's business dealings and agreements with other fantasy
12 horse racing and/or handicapping contest sites;
- 13 • Documents regarding the financial aspects of Plaintiffs' and/or the
14 Stronach Groups' business dealings and agreements with other fantasy
15 horse racing and/or handicapping contest sites;
- 16 • Documents and communications regarding Plaintiffs' interactions with
17 state horse racing boards and commissions and state legislatures,
18 including specifically the CHRB;
- 19 • Documents and communications regarding Plaintiffs' and/or the
20 Stronach Group's purported damages in this action;
- 21 • Documents and communications regarding Plaintiffs' decision to file
22 this lawsuit.

23 **E. Derby Wars' Seventh Affirmative Defense – Failure to Mitigate**

24 a. Summary Statement of Defense

25 Derby Wars contends that Plaintiffs, in the exercise of reasonable diligence,
26 could have mitigated their alleged damages, but failed to do so. Indeed, by sitting
27
28

1 on their rights for years. Plaintiffs acted to increase their purported damages, to
2 Derby Wars' detriment.

3 b. Elements Required to Establish Defense

4 Each party has a duty to use reasonable efforts to mitigate damages. To
5 mitigate means to avoid or reduce damages. Where a party wins on a cause of
6 action, the losing party has the burden of proving by a preponderance of the
7 evidence:

8 (a) That the winning party failed to use reasonable efforts to mitigate
9 damages; *and*

10 (b) the amount by which damages would have been mitigated.

11 See Ninth Circuit Model Civil Jury Instructions No. 5.3 (2007).

12 c. Key Evidence in Support of Defense

13 The following is a representative (not an exhaustive) list of key evidence that
14 Derby Wars will use to prove its affirmative defense at trial:

- 15 • Testimony of Mark Midland;
- 16 • Testimony of Mike Shutty;
- 17 • Testimony of Scott Daruty;
- 18 • Testimony of Mike Rogers;
- 19 • Testimony of Timothy Ritvo;
- 20 • Testimony of Michael Calderone;
- 21 • Documents and communications between Plaintiffs, on the one hand,
22 and Derby Wars and/or the Stronach Group and/or third parties, and
23 internally amongst Plaintiffs, establishing that Plaintiffs were aware of
24 Derby Wars' fantasy horse racing contests as early as September 2011,
25 well before December 2012;
- 26 • Documents and communications between Plaintiffs, on the one hand,
27 and Derby Wars and/or the Stronach Group and/or third parties, and
internally amongst Plaintiffs, evidencing that despite their awareness

1 of Derby Wars' fantasy horse racing contests as early as September
2 2011, Plaintiffs never objected to Derby Wars' conduct prior to the
3 filing of this action;

4 • Documents and communications between Plaintiffs and Derby Wars
5 evidencing Plaintiffs' efforts to engage Derby Wars in sponsorship
6 arrangements, joint venture agreements, and/or a potential acquisition;
7 • Documents and communications between Plaintiffs and Derby Wars
8 establishing that Derby Wars detrimentally relied on Plaintiffs' failure
9 to object to Derby Wars' conduct prior to filing this action (*e.g.*,
10 documents and communications evidencing time and resources
11 invested to grow Derby Wars' fantasy contest business model);
12 • Documents and communications between Plaintiffs' and the Stronach
13 Group's representatives and agents, on the one hand, and Derby Wars'
14 representatives and agents, on the other hand, regarding business
15 dealings and relationships with Plaintiffs and the Stronach Group;
16 • Documents and communications between Plaintiffs' and the Stronach
17 Group's representatives and agents, on the one hand, and Derby Wars'
18 representatives and agents, on the other hand, regarding cross
19 marketing efforts between Plaintiffs and Derby Wars;
20 • Documents and communications regarding Plaintiffs' and/or the
21 Stronach Group's purported damages in this action; and
22 • Documents and communications regarding Plaintiffs' decision to file
23 this lawsuit.

24 **F. Derby Wars' Ninth Affirmative Defense – Waiver**

25 a. Summary Statement of Defense

26 Plaintiffs' claims are barred in whole or in part by the doctrine of waiver.

27 Plaintiffs were aware of Derby Wars' fantasy horse racing contests as early as

28

1 September 2011, and intentionally sat on their rights in order for, among other
2 things, damages against Derby Wars to accumulate. Derby Wars relied on
3 Plaintiffs' inaction to its detriment.

4 b. Elements Required to Establish Defense

5 Waiver is "the intentional relinquishment of a known right with knowledge
6 of its existence and the intent to relinquish it." *Gibson Brands, Inc. v. John Hornby*
7 *Skewes & Co. Ltd.*, No. CV 14-00609 DDP SSX, 2014 WL 5419512, at *3 (C.D.
8 Cal. Oct. 23, 2014) (citing *adidas-Am., Inc. v. Payless Shoesource, Inc.*, 546
9 F.Supp.2d 1029, 1074 (D. Or. 2008); *see also Oakland Raiders v. Oakland-*
10 *Alameda Cty. Coliseum, Inc.*, 144 Cal. App. 4th 1175, 1189-90 (2006) (internal
11 citations omitted)). "An implied waiver of rights will be found where there is
12 'clear, decisive and unequivocal' conduct which indicates a purpose to waive the
13 legal rights involved." *United States v. Amwest Surety Ins. Co.*, 54 F.3d 601, 602-
14 03 (9th Cir. 1995) (quoting *Groves v. Prickett*, 420 F.2d 1119, 1125 (9th Cir.
15 1970)).

16 c. Key Evidence in Support of Defense

17 The following is a representative (not an exhaustive) list of key evidence that
18 Derby Wars will use to prove its affirmative defense at trial:

19 • Testimony of Mark Midland;
20 • Testimony of Michael Shutty;
21 • Testimony of Scott Daruty;
22 • Testimony of Timothy Ritvo;
23 • Testimony of Michael Rogers;
24 • Testimony of John Ford;
25 • Testimony of Joe Morris;
26 • Testimony of Nate Newby;
27 • Testimony of Andrew Arthur;
28 • Testimony of Gregory Avioli;

- 1 • Testimony of Eric Sindler;
- 2 • Testimony of Michael Calderone;
- 3 • Testimony of Gregory Avioli;
- 4 • Testimony of Rick Baedeker;
- 5 • Documents and communications between Plaintiffs, on the one hand,
6 and Derby Wars and/or the Stronach Group and/or third parties, and
7 internally amongst Plaintiffs, establishing that Plaintiffs were aware of
8 Derby Wars' fantasy horse racing contests as early as September 2011,
9 well before December 2012;
- 10 • Documents and communications between Plaintiffs, on the one hand,
11 and Derby Wars and/or the Stronach Group and/or third parties, on the
12 other hand, and internally amongst Plaintiffs, evidencing that despite
13 their awareness of Derby Wars' fantasy horse racing contests as early
14 as September 2011, Plaintiffs never objected to Derby Wars' conduct
15 prior to the filing of this action;
- 16 • Documents and communications between Plaintiffs and Derby Wars
17 evidencing Plaintiffs' efforts to engage Derby Wars in sponsorship
18 arrangements, joint venture agreements, and/or a potential acquisition;
- 19 • Documents and communications between Plaintiffs and Derby Wars
20 establishing that Derby Wars detrimentally relied on Plaintiffs' failure
21 to object to Derby Wars' conduct prior to filing this action (i.e.
22 documents and communications evidencing time and resources
23 invested to grow Derby Wars' fantasy contest business model);
- 24 • Documents and communications between Los Angeles Turf Club, Inc.
25 ("LATC") and Derby Wars establishing that LATC engaged in a
26 marketing and sponsorship agreement with Derby Wars relating to the
27 Santa Anita Showvivor contest (*e.g.*, Santa Anita's email "blasts" to its
28 many thousands of customers promoting Derby Wars fantasy

1 contests);

2 • Documents and data establishing the positive impact of fantasy horse

3 racing contests on tracks' pari-mutuel handle (*e.g.*, BetAmerica's

4 assessment of data regarding the effect of BetAmerica's contests on

5 Gulfstream and Santa Anita Pari-Mutuel Results);

6 • Documents and communications between Plaintiffs' and the Stronach

7 Group's representatives and agents, on the one hand, and Derby Wars'

8 representatives and agents, on the other hand, regarding business

9 dealings and relationships with Plaintiffs and the Stronach Group;

10 • Documents and communications between Plaintiffs' and the Stronach

11 Group's representatives and agents, on the one hand, and Derby Wars'

12 representatives and agents, on the other hand, regarding cross

13 marketing efforts between Plaintiffs and Derby Wars;

14 • Documents and communications regarding Plaintiffs' and/or the

15 Stronach Group's business dealings and agreements with other fantasy

16 horse racing and/or handicapping contest sites;

17 • Documents regarding the financial aspects of Plaintiffs' and/or the

18 Stronach Groups' business dealings and agreements with other fantasy

19 horse racing and/or handicapping contest sites;

20 • Documents and communications regarding Plaintiffs' interactions with

21 state horse racing boards and commissions and state legislatures,

22 including specifically the CHRB;

23 • Documents and communications regarding Plaintiffs' and/or the

24 Stronach Group's purported damages in this action;

25 • Documents and communications regarding Plaintiffs' decision to file

26 this lawsuit.

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1 **G. Derby Wars' Tenth Affirmative Defense – Estoppel**

2 a. Summary Statement of Defense

3 Derby Wars contends that Plaintiffs claims are barred in whole or in part by
4 the doctrine of estoppel. Plaintiffs were aware of Derby Wars' fantasy horse racing
5 contests as early as September 2011. Derby Wars reasonably relied on Plaintiffs'
6 inaction to its detriment.

7 b. Elements Required to Establish Defense

8 Estoppel applies "where the conduct of one side has induced the other to take
9 such a position that it would be injured if the first should be permitted to repudiate
10 its acts. *Oakland Raiders v. Oakland-Alameda Cty. Coliseum, Inc.*, 144 Cal. App.
11 4th 1175, 1189-90 (2006) (citing *Old Republic Ins. Co. v. FSR Brokerage Inc.*, 80
12 Cal. App. 4th 666, 678 (2000)).

13 To prevail on an affirmative defense of estoppel, Derby Wars must establish:

14 (a) The party to be estopped must know the facts;

15 (b) He must intend that his conduct shall be acted on or must so act
16 that the party asserting the estoppel has a right to believe it is so intended;

17 (c) The latter must be ignorant of the true facts; *and*

18 (d) He must rely on the former's conduct to his injury.

19 *Quest Software, Inc. v. DirecTV Operations, LLC*, No. SACV 09-1232, 2011 WL
20 4500922, at *5-6 (C.D. Cal. Sept. 26, 2011) (citing *United States v. King Features
Entm't, Inc.*, 843 F.3d 394, 399 (9th Cir. 1988)).

22 c. Key Evidence in Support of Defense

23 The following is a representative (not an exhaustive) list of key evidence that
24 Derby Wars will use to prove its affirmative defense at trial:

25 • Testimony of Mark Midland;
26 • Testimony of Michael Shutty;
27 • Testimony of Scott Daruty;
28 • Testimony of Timothy Ritvo;

- 1 • Testimony of Michael Rogers;
- 2 • Testimony of John Ford;
- 3 • Testimony of Joe Morris;
- 4 • Testimony of Nate Newby;
- 5 • Testimony of Andrew Arthur;
- 6 • Testimony of Gregory Avioli;
- 7 • Testimony of Eric Sindler;
- 8 • Testimony of Michael Calderone;
- 9 • Testimony of Gregory Avioli;
- 10 • Testimony of Rick Baedeker;
- 11 • Documents and communications between Plaintiffs, on the one hand,
12 and Derby Wars and/or the Stronach Group and/or third parties, and
13 internally amongst Plaintiffs, establishing that Plaintiffs were aware of
14 Derby Wars' fantasy horse racing contests as early as September 2011,
15 well before December 2012;
- 16 • Documents and communications between Plaintiffs, on the one hand,
17 and Derby Wars and/or the Stronach Group and/or third parties, on the
18 other hand, and internally amongst Plaintiffs, evidencing that despite
19 their awareness of Derby Wars' fantasy horse racing contests as early
20 as September 2011, Plaintiffs never objected to Derby Wars' conduct
21 prior to the filing of this action;
- 22 • Documents and communications between Plaintiffs and Derby Wars
23 evidencing Plaintiffs' efforts to engage Derby Wars in sponsorship
24 arrangements, joint venture agreements, and/or a potential acquisition;
- 25 • Documents and communications between Plaintiffs and Derby Wars
26 establishing that Derby Wars detrimentally relied on Plaintiffs' failure
27 to object to Derby Wars' conduct prior to filing this action (i.e.
28 documents and communications evidencing time and resources

invested to grow Derby Wars' fantasy contest business model);

- Agreements between Plaintiffs and third parties, including simulcasting and ADW agreements, regarding horse wagering;
- Documents and communications between Los Angeles Turf Club, Inc. (“LATC”) and Derby Wars establishing that LATC engaged in a marketing and sponsorship agreement with Derby Wars relating to the Santa Anita Showvivor contest (*e.g.*, Santa Anita’s email “blasts” to its many thousands of customers promoting Derby Wars fantasy contests);
- Documents and data establishing the positive impact of fantasy horse racing contests on tracks’ pari-mutuel handle (*e.g.*, BetAmerica’s assessment of data regarding the effect of BetAmerica’s contests on Gulfstream and Santa Anita Pari-Mutuel Results);
- Documents and communications between Plaintiffs’ and the Stronach Group’s representatives and agents, on the one hand, and Derby Wars’ representatives and agents, on the other hand, regarding business dealings and relationships with Plaintiffs and the Stronach Group;
- Documents and communications between Plaintiffs’ and the Stronach Group’s representatives and agents, on the one hand, and Derby Wars’ representatives and agents, on the other hand, regarding cross marketing efforts between Plaintiffs and Derby Wars;
- Documents and communications regarding Plaintiffs’ and/or the Stronach Group’s business dealings and agreements with other fantasy horse racing and/or handicapping contest sites;
- Documents regarding the financial aspects of Plaintiffs’ and/or the Stronach Groups’ business dealings and agreements with other fantasy horse racing and/or handicapping contest sites;
- Documents and communications regarding Plaintiffs’ interactions with

1 state horse racing boards and commissions and state legislatures,
2 including specifically the CHRB;

3 • Documents and communications regarding Plaintiffs' and/or the
4 Stronach Group's purported damages in this action; and

5 • Documents and communications regarding Plaintiffs' decision to file
6 this lawsuit.

7 **H. Derby Wars' Eleventh Affirmative Defense – Unclean Hands**

8 a. Summary Statement of Defense

9 Plaintiffs' conduct is inequitable and they have come to court with unclean
10 hands, for the many reasons set forth below. Plaintiffs have entered into
11 agreements with third parties, allowing them to conduct online fantasy contests
12 substantially similar to that of Derby Wars, without payment to Plaintiffs. Plaintiffs
13 have given consent to these third parties to use Plaintiffs' content for their fantasy
14 contests, while depriving Derby Wars of the same. Additionally, Plaintiffs have
15 intentionally interfered with Derby Wars' existing and prospective business
16 agreements with third parties. For example, Plaintiffs contacted the National
17 Thoroughbred Racing Association ("NTRA") and interfered with a request for
18 proposal for which Derby Wars was the lead contender. Derby Wars would have
19 won the request for proposal, but for Plaintiffs' interference, and consequently
20 Derby Wars' competitor was awarded the proposal. Plaintiffs also contacted the
21 Television Games Network ("TVG") and expressed its disapproval of TVG's
22 marketing arrangements with Derby Wars, after which TVG discontinued these
23 marketing arrangements. Plaintiffs have attempted to interfere with Derby Wars'
24 negotiations with Watch and Wager, the operator of the Cal-Expo racetrack.
25 Further, Plaintiffs were aware of Derby Wars' fantasy horse racing contests as early
26 as September 2011, and intentionally sat on their rights in order for, among other
27 things, damages against Derby Wars to accumulate. Derby Wars relied on
28 Plaintiffs' inaction to its detriment. Plaintiffs have communicated internally and

1 with third parties, expressing that they intended this litigation to cripple Derby
2 Wars' business. Further, Plaintiffs have engaged in and are currently engaging in
3 other business practices that are unfair, misleading, and improper.

4 b. Elements Required to Establish Defense

5 The doctrine of unclean hands may bar relief to a party whose conduct is
6 tainted with fraud, deceit, or bad faith. In order to find that the defense of unclean
7 hands applies, the jury must find by a preponderance of the evidence that:

- 8 a. Plaintiffs engaged in misconduct;
- 9 b. Plaintiffs misconduct was egregious and nontrivial;
- 10 c. Plaintiffs misconduct is immediately and necessarily related to
the subject of the claims that Plaintiffs now assert; and
- 12 d. Derby Wars was injured as a result of Plaintiffs' misconduct.

13 *See Morton Salt Co. v. G. S. Sippiger Co.*, 314 U.S. 488 (1942); *Int'l*
14 *News Serv. v. Associated Press*, 248 U.S. 215 (1919); *Manhattan Medicine Co. v.*
15 *Wood*, 108 U.S. 218 (1883); *Levi Strauss & Co. v. Shilon*, 121 F.3d 1309, 1313 (9th
16 Cir. 1997); *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 841 (9th
17 Cir. 2002).

18 c. Key Evidence in Support of Defense

19 The following is a representative (not an exhaustive) list of key evidence that
20 Derby Wars will use to prove its affirmative defense at trial.

- 21 • Testimony of Mark Midland;
- 22 • Testimony of Michael Shutty;
- 23 • Testimony of Scott Daruty;
- 24 • Testimony of Timothy Ritvo;
- 25 • Testimony of Michael Rogers;
- 26 • Testimony of John Ford;
- 27 • Testimony of Joe Morris;
- 28 • Testimony of Nate Newby;

- 1 • Testimony of Andrew Arthur;
- 2 • Testimony of Eric Sindler;
- 3 • Testimony of Michael Calderone;
- 4 • Testimony of Gregory Avioli;
- 5 • Testimony of Ed Comins;
- 6 • Testimony of Chris Schick;
- 7 • Testimony of Rick Baedeker;
- 8 • Documents and communications between Plaintiffs' and the Stronach
- 9 Group's representatives and agents, on the one hand, and Derby Wars'
- 10 representatives and agents, on the other hand, regarding business
- 11 dealings and relationships with Plaintiffs and the Stronach Group;
- 12 • Documents and communications between Plaintiffs' and the Stronach
- 13 Group's representatives and agents, on the one hand, and Derby Wars'
- 14 representatives and agents, on the other hand, regarding cross
- 15 marketing efforts between Plaintiffs and Derby Wars;
- 16 • Documents and communications regarding Plaintiffs' decision to file
- 17 this lawsuit;
- 18 • Documents and communications between Plaintiffs and third parties
- 19 establishing that Plaintiffs have entered into agreements with third
- 20 parties permitting third party contest sites to conduct fantasy horse
- 21 racing contests substantially similar to Derby Wars' contests, without
- 22 payment to Plaintiffs;
- 23 • Documents and communications between Plaintiffs and third parties
- 24 establishing that Plaintiffs have given consent to substantially similar
- 25 third party contest sites to use Plaintiffs' content, while depriving
- 26 Derby Wars of such consent;
- 27 • Documents and communications establishing that licenses to conduct
- 28 ADW and simulcasting do not cover fantasy horse racing contests, and

1 do not treat fantasy contests as pari-mutuel wagering;

2 • Documents and communications between Plaintiffs and the NTRA
3 and/or the Breeders' Cup, LLC, between Plaintiffs and the Stronach
4 Group, and between Derby Wars and the NTRA and/or Breeders' Cup,
5 LLC, establishing that Plaintiffs interfered with a request for proposal
6 that Derby Wars bid for, and otherwise would have won, but for
7 Plaintiffs direct interference;

8 • Documents and communications between Plaintiffs and/or Derby Wars
9 and TVG establishing that Plaintiffs directly interfered with marketing
10 negotiations, arrangements, and agreements between Derby Wars and
11 TVG, with the intention of harming Derby Wars' business (*e.g.*, an
12 October 2015 email from Scott Daruty to TVG executives expressing
13 concern about TVG's advertisement of Derby Wars' contests);

14 • Documents and communications between Plaintiffs and Watch and
15 Wager, operator of Cal-Expo race track, evidencing Plaintiffs'
16 attempts to interfere with negotiations, arrangements, and agreements
17 between Derby Wars and Watch and Wager;

18 • Documents and communications internally amongst Plaintiffs, and
19 between executives of the Stronach Group and third parties,
20 establishing Plaintiffs' intention to use this litigation to cripple Derby
21 Wars' business;

22 • Documents and communications establishing that Plaintiffs are
23 engaging in improper business practices;

24 • Documents and communications establishing Plaintiffs' use of unfair
25 and misleading business practices without adequate disclosure to
26 consumers and bettors at Plaintiffs' tracks.

27

28

1 **I. Derby Wars' Twelfth Affirmative Defense – Proximate Cause**

2 a. Summary Statement of Defense

3 Derby Wars contends that Plaintiffs cannot prove any facts showing that
4 Derby Wars' conduct was the proximate cause of the losses incurred and the
5 damages sought, if any.

6 b. Elements Required to Establish Defense

7 To succeed on its California UCL claim, Plaintiffs must establish by a
8 preponderance of the evidence that their economic injury came as a result of the
9 unfair competition. The phrase “as a result of” in its plain and ordinary sense
10 means “caused by” and requires a showing of a causal connection or reliance on the
11 unfair business practice. *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 326
12 (2011). The Court has already ruled that Plaintiffs may not seek restitution for their
13 UCL claim. (MJOP Order at 5.)

14 c. Key Evidence in Support of Defense

15 The following is a representative (not an exhaustive) list of key evidence that
16 Derby Wars will use to prove its affirmative defense at trial:

- 17 • Testimony of Mark Midland;
- 18 • Testimony of Michael Shutty;
- 19 • Testimony of Scott Daruty;
- 20 • Testimony of Timothy Ritvo;
- 21 • Testimony of Michael Rogers;
- 22 • Testimony of John Ford;
- 23 • Testimony of Michael Calderone;
- 24 • Testimony of Rick Baedeker;
- 25 • Documents and data establishing the positive impact of fantasy horse
26 racing contests on tracks’ pari-mutuel handle (e.g., BetAmerica’s
27 assessment of data regarding the effect of BetAmerica’s contests on
28 Gulfstream and Santa Anita Pari-Mutuel Results);

- 1 • Documents and communications between Plaintiffs and third parties
2 establishing that Plaintiffs have entered into agreements with third
3 parties permitting third party contest sites to conduct fantasy horse
4 racing contests substantially similar to Derby Wars' contests, without
5 payment to Plaintiffs;
- 6 • Documents and communications between Plaintiffs and third parties
7 establishing that Plaintiffs have given consent to substantially similar
8 third party contest sites to use Plaintiffs' content, while depriving
9 Derby Wars of such consent; and
- 10 • Documents and communications establishing that licenses to conduct
11 ADW and simulcasting do not cover fantasy horse racing contests, and
12 do not treat fantasy contests as pari-mutuel wagering.

13 **J. Derby Wars' Thirteenth Affirmative Defense – No Attorneys' Fees**

14 a. Summary Statement of Defense

15 To the extent Plaintiffs seek an award of attorneys' fees or costs, Plaintiffs
16 have failed to prove their entitlement to such an award. Further, there is no
17 provision for the awarding of attorneys' fees under either the IHA or UCL.

18 **K. Derby Wars' Fourteenth Affirmative Defense – No Restitution or**
19 **Disgorgement**

20 a. Summary Statement of Defense

21 To the extent Plaintiffs seek an award of restitution or disgorgement of
22 profits under the UCL, such awards are unavailable as a matter of law.

23 b. Elements Required to Establish Defense

24 The UCL does not provide for non-restitutionary disgorgement. *Korea*
25 *Supply v. Lockheed Martin*, 29 Cal. 4th 1134, 1144, 1148 (2003). Therefore to
26 prove entitlement to restitution, Plaintiffs must show that Derby Wars received and
27 unjustly retained a benefit at Plaintiffs' expense. *Lectrodryer v. SeoulBank*, 77 Cal.

28

1 App. 4th 723, 726 (2000). The Court has already ruled that Plaintiffs are not
2 entitled to seek restitution under the UCL in this action. (MJOP Order at 5.)

3 c. Key Evidence in Support of Defense

4 The following is a representative (not an exhaustive) list of key evidence that
5 Derby Wars will use to prove its affirmative defense at trial:

- 6 • Testimony of Mark Midland;
- 7 • Testimony of Mike Shutty;
- 8 • Testimony of Scott Daruty;
- 9 • Testimony of Mike Rogers;
- 10 • Testimony of Timothy Ritvo;
- 11 • Testimony of Michael Calderone;
- 12 • Testimony of Joe Morris;
- 13 • Testimony of Nate Newby;
- 14 • Testimony of Andrew Arthur;
- 15 • Testimony of John Ford;
- 16 • Testimony of Rick Baedeker;
- 17 • Testimony of Randal Heeb, Ph.D.;
- 18 • Plaintiffs' responses to interrogatories;
- 19 • The Corrected Expert Report of Randal Heeb, Ph.D.;
- 20 • Documents and communications between Plaintiffs, on the one hand,
21 and Derby Wars and/or the Stronach Group and/or third parties, and
22 internally amongst Plaintiffs, establishing that Plaintiffs were aware of
23 Derby Wars' fantasy horse racing contests as early as September 2011,
24 well before December 2012;
- 25 • Documents and communications between Plaintiffs, on the one hand,
26 and Derby Wars and/or the Stronach Group and/or third parties, on the
27 other hand, and internally amongst Plaintiffs, evidencing that despite
28 their awareness of Derby Wars' fantasy horse racing contests as early

1 as September 2011, Plaintiffs never objected to Derby Wars' conduct
2 prior to the filing of this action;

- 3 • Documents and communications between Plaintiffs and Derby Wars
4 evidencing Plaintiffs' efforts to engage Derby Wars in sponsorship
5 arrangements, joint venture agreements, and/or a potential acquisition;
- 6 • Documents and communications between Plaintiffs and Derby Wars
7 establishing that Derby Wars detrimentally relied on Plaintiffs' failure
8 to object to Derby Wars' conduct prior to filing this action (*e.g.*,
9 documents and communications evidencing time and resources
10 invested to grow Derby Wars' fantasy contest business model);
- 11 • Documents and communications between Plaintiffs' and the Stronach
12 Group's representatives and agents, on the one hand, and Derby Wars'
13 representatives and agents, on the other hand, regarding business
14 dealings and relationships with Plaintiffs and the Stronach Group;
- 15 • Documents and communications between Plaintiffs' and the Stronach
16 Group's representatives and agents, on the one hand, and Derby Wars'
17 representatives and agents, on the other hand, regarding cross
18 marketing efforts between Plaintiffs and Derby Wars;
- 19 • Documents and data establishing the positive impact of fantasy horse
20 racing contests on tracks' pari-mutuel handle (*e.g.*, BetAmerica's
21 assessment of data regarding the effect of BetAmerica's contests on
22 Gulfstream and Santa Anita Pari-Mutuel Results).
- 23 • Documents regarding the financial aspects of Derby Wars' contests
24 and revenues;
- 25 • Documents regarding wagering on horse racing and operation of
26 Plaintiffs' racetracks;
- 27 • Plaintiffs' licenses to operate race tracks and accept wagers on horse
28 races;

- 1 • Plaintiffs' agreements with the horsemen's groups and host race states;
- 2 • Documents and communications regarding Plaintiffs' and/or the
- 3 Stronach Group's business dealings and agreements with other fantasy
- 4 horse racing and/or handicapping contest sites;
- 5 • Documents regarding the financial aspects of Plaintiffs' and/or the
- 6 Stronach Groups' business dealings and agreements with other fantasy
- 7 horse racing and/or handicapping contest sites;
- 8 • Documents and communications regarding Plaintiffs' and/or the
- 9 Stronach Group's purported damages in this action; and
- 10 • Documents and communications regarding Plaintiffs' decision to file
- 11 this lawsuit.

12 **L. Derby Wars' Fifteenth Affirmative Defense – No Standing Under**
13 **the UCL**

14 a. **Summary Statement of Defense**

15 Plaintiffs lack standing to seek injunctive relief under the UCL because (1)
16 they have no relationship with Derby Wars and (2) the UCL does not regulate
17 parties or conduct unconnected to California, and UCL claims cannot be based on
18 laws from any state other than California.

19 b. **Elements Required to Establish Defense**

20 Under the heightened standing requirement for claims under the UCL
21 following the passage of Proposition 64 in California, a private party must (1)
22 establish a loss or deprivation of money or property sufficient to qualify as injury in
23 fact, i.e., economic injury, and (2) show that that economic was the result of, i.e.
24 caused by, the unfair business practice." Cal. Bus. & Prof. Code § 17204;
25 *Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 788 (2010).

26 Economic injury may be shown where, among other things, plaintiffs: (i)
27 surrender more or acquire less in a transaction than they otherwise would have; (ii)
28 "have a present or future property interest diminished"; are "deprived of money or

1 property to which [they have] cognizable claim"; or (iv) are "required to enter into
2 a transaction, costing money or property, that would otherwise have been
3 unnecessary." *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 321 (2011).

4 This Court has already ruled that Plaintiffs may not seek restitution under
5 their UCL claim. (MJOP Order at 5.)

6 The UCL does not regulate parties or conduct unconnected to California, and
7 cannot be based on laws from any state other than California. *Norwest Mortg., Inc.*
8 *v. Superior Court*, 72 Cal. App. 4th 214, 225-27 (1999); *Sullivan v. Oracle Corp.*,
9 51 Cal. 4th 1191, 1206-09 (2011); *Washington Mut. Bank, FA v. Superior Court*, 24
10 Cal. 4th 906, 919-20 (2001).

11 The elements Plaintiffs must establish to obtain permanent injunctive relief
12 for this claim are: (1) that Plaintiffs have suffered an irreparable injury; (2) that
13 remedies available at law, such as monetary damages, are inadequate to compensate
14 for that injury; (3) that, considering the balance of the hardships between Plaintiffs
15 and Derby Wars, a remedy in equity is warranted; and (4) that the public interest
16 would not be disserved by a permanent injunction. *La Quinta Worldwide LLC v.*
17 *Q.R.T.M., S.A. de C.V.*, 762 F.3d 867, 879 (9th Cir. 2014); *Allergan, Inc. v. Athena*
18 *Cosmetics, Inc.*, No. SACV071316 JVS RNBX, 2013 WL 12142655, at *2 (C.D.
19 Cal. Mar. 6, 2013).

20 c. Key Evidence in Support of Defense

21 The following is a representative (not an exhaustive) list of key evidence that
22 Derby Wars will use to prove its affirmative defense at trial.

23 • Testimony of Mark Midland;
24 • Testimony of Michael Shutty;
25 • Testimony of Scott Daruty;
26 • Testimony of Timothy Ritvo;
27 • Testimony of Michael Rogers;
28 • Testimony of John Ford;

- 1 • Testimony of Joe Morris;
- 2 • Testimony of Nate Newby;
- 3 • Testimony of Andrew Arthur;
- 4 • Testimony of Eric Sindler;
- 5 • Testimony of Michael Calderone;
- 6 • Testimony of Gregory Avioli;
- 7 • Testimony of Ed Comins;
- 8 • Testimony of Chris Schick;
- 9 • Testimony of Rick Baedeker;
- 10 • Testimony of Randal Heeb, Ph.D.;
- 11 • The Corrected Expert Report of Randal Heeb, Ph.D.;
- 12 • Plaintiffs' responses to interrogatories;
- 13 • Documents and communications between Plaintiffs' and the Stronach Group's representatives and agents, on the one hand, and Derby Wars' representatives and agents, on the other hand, regarding business dealings and relationships with Plaintiffs and the Stronach Group;
- 14 • Documents and communications between Plaintiffs' and the Stronach Group's representatives and agents, on the one hand, and Derby Wars' representatives and agents, on the other hand, regarding cross marketing efforts between Plaintiffs and Derby Wars;
- 15 • Documents regarding the financial aspects of Derby Wars' contests and revenues;
- 16 • Documents regarding wagering on horse racing and the operation of Plaintiffs' racetracks;
- 17 • Plaintiffs' licenses to operate race tracks and accept wagers on horse races;
- 18 • Plaintiffs' agreements with the horsemen's groups and host race states;
- 19 • Agreements between Plaintiffs and third parties, including

simulcasting and ADW agreements, regarding horse wagering;

- Documents and communications regarding Plaintiffs' and/or the Stronach Group's business dealings and agreements with other fantasy horse racing and/or handicapping contest sites;
- Documents regarding the financial aspects of Plaintiffs' and/or the Stronach Groups' business dealings and agreements with other fantasy horse racing and/or handicapping contest sites;
- Documents and communications regarding Plaintiffs' interactions with state horse racing boards and commissions and state legislatures, including specifically the CHRB; and
- Documents and communications regarding Plaintiffs' and/or the Stronach Group's purported damages in this action.

M. **Derby Wars' Sixteenth Affirmative Defense – Justified Fair Competition**

a. Summary Statement of Defense

Derby Wars contends that its conduct was not and is not unfair within the meaning of California Business & Professions Code sections 17200 *et seq.*, and is justified by legitimate business and competitive reasons.

b. Elements Required to Establish Defense

If a defendant claims that he/she is not responsible for a plaintiff's harm because defendant's conduct was permissible, to succeed the defendant must prove all of the following:

(a) That the defendant was exercising his/her legal right to engage in that conduct or protect his / her economic interests;

(b) That the defendant's conduct was lawful and consistent with community standards; and

(c) That the defendant had a good-faith belief that he/she had a legal right to engage in the conduct.

1 If you find all of the above, then the defendant's conduct was permissible.

2 See CACI No. 1605, VF-1601 (privilege to protect economic interests);

3 Restatement (3d) of Unfair Competition § 1 (1995) (freedom to compete).

4 c. Key Evidence in Support of Defense

5 The following is a representative (not an exhaustive) list of key evidence that
6 Derby Wars will use to prove its affirmative defense at trial:

- 7 • Testimony of Mark Midland;
- 8 • Testimony of Michael Shutty;
- 9 • Testimony of John Ford;
- 10 • Testimony of Joe Morris;
- 11 • Testimony of Nate Newby;
- 12 • Testimony of Andrew Arthur;
- 13 • Testimony of Rick Baedeker;
- 14 • Testimony of Michael Calderone;
- 15 • Documents and communications between Plaintiffs' and the Stronach
16 Group's representatives and agents, on the one hand, and Derby Wars'
17 representatives and agents, on the other hand, regarding business
18 dealings and relationships with Plaintiffs and the Stronach Group;
- 19 • Documents and communications between Plaintiffs' and the Stronach
20 Group's representatives and agents, on the one hand, and Derby Wars'
21 representatives and agents, on the other hand, regarding cross
22 marketing efforts between Plaintiffs and Derby Wars;
- 23 • Documents regarding the financial aspects of Derby Wars' contests
24 and revenues;
- 25 • Documents regarding wagering on horse racing and operation of
26 Plaintiffs' racetracks;
- 27 • Plaintiffs' licenses to operate race tracks and accept wagers on horse
28 races;

- 1 • Plaintiffs' agreements with the horsemen's groups and host race states;
- 2 • Agreements between Plaintiffs and third parties, including
- 3 simulcasting and ADW agreements, regarding horse wagering;
- 4 • Documents and communications regarding Plaintiffs' and/or the
- 5 Stronach Group's business dealings and agreements with other fantasy
- 6 horse racing and/or handicapping contest sites;
- 7 • Documents regarding the financial aspects of Plaintiffs' and/or the
- 8 Stronach Groups' business dealings and agreements with other fantasy
- 9 horse racing and/or handicapping contest sites;
- 10 • Documents and communications between Plaintiffs and third parties
- 11 establishing that Plaintiffs have entered into agreements with third
- 12 parties permitting third party contest sites to conduct fantasy horse
- 13 racing contests substantially similar to Derby Wars' contests, without
- 14 payment to Plaintiffs;
- 15 • Documents and communications between Plaintiffs and third parties
- 16 establishing that Plaintiffs have given consent to substantially similar
- 17 third party contest sites to use Plaintiffs' content, while depriving
- 18 Derby Wars of such consent;
- 19 • Documents and communications establishing that licenses to conduct
- 20 ADW and simulcasting do not cover fantasy horse racing contests, and
- 21 do not treat fantasy contests as pari-mutuel wagering;
- 22 • Documents and communications regarding Plaintiffs' interactions with
- 23 state horse racing boards and commissions and state legislatures,
- 24 including specifically the CHRB;
- 25 • Documents and communications regarding Plaintiffs' and/or the
- 26 Stronach Group's purported damages in this action; and
- 27 • Documents and communications regarding Plaintiffs' decision to file
- 28 this lawsuit.

1 **N. Derby Wars' Seventeenth / Eighteenth Affirmative Defenses –**
2 **Lawful Conduct / Conduct Not Unlawful**

3 a. Summary Statement of Defense

4 Plaintiffs' claim under the UCL is barred as Derby Wars' conduct is not
5 "unlawful" within the meaning of California Business & Professions Code Sections
6 17200 and/or 17500.

7 b. Elements Required to Establish Defense

8 "[U]nfair competition shall mean and include any unlawful, unfair or
9 fraudulent business act or practice and unfair, deceptive, untrue or misleading
10 advertising and any act prohibited by Chapter 1 (commencing with Section 17500)
11 of Part 3 of Division 7 of the Business and Professions Code." Cal. Bus. & Prof.
12 Code § 17200.

13 c. Key Evidence in Support of Defense

- 14 • Testimony of Mark Midland;
- 15 • Testimony of Michael Shutty;
- 16 • Testimony of John Ford;
- 17 • Testimony of Joe Morris;
- 18 • Testimony of Nate Newby;
- 19 • Testimony of Andrew Arthur;
- 20 • Testimony of Rick Baedeker;
- 21 • Testimony of Michael Calderone;
- 22 • Documents and communications between Plaintiffs' and the Stronach
23 Group's representatives and agents, on the one hand, and Derby Wars'
24 representatives and agents, on the other hand, regarding business
25 dealings and relationships with Plaintiffs and the Stronach Group;
- 26 • Documents and communications between Plaintiffs' and the Stronach
27 Group's representatives and agents, on the one hand, and Derby Wars'
28 representatives and agents, on the other hand, regarding cross

1 marketing efforts between Plaintiffs and Derby Wars;

2 • Documents regarding the financial aspects of Derby Wars' contests

3 and revenues;

4 • Documents regarding wagering on horse racing and operation of

5 Plaintiffs' racetracks;

6 • Plaintiffs' licenses to operate race tracks and accept wagers on horse

7 races;

8 • Plaintiffs' agreements with the horsemen's groups and host race states;

9 • Agreements between Plaintiffs and third parties, including

10 simulcasting and ADW agreements, regarding horse wagering;

11 • Documents and communications regarding Plaintiffs' and/or the

12 Stronach Group's business dealings and agreements with other fantasy

13 horse racing and/or handicapping contest sites;

14 • Documents regarding the financial aspects of Plaintiffs' and/or the

15 Stronach Groups' business dealings and agreements with other fantasy

16 horse racing and/or handicapping contest sites;

17 • Documents and communications regarding Plaintiffs' interactions with

18 state horse racing boards and commissions and state legislatures,

19 including specifically the CHRB;

20 • Documents and data establishing the positive impact of fantasy horse

21 racing contests on tracks' pari-mutuel handle (*e.g.*, BetAmerica's

22 assessment of data regarding the effect of BetAmerica's contests on

23 Gulfstream and Santa Anita Pari-Mutuel Results);

24 • Documents and communications regarding Plaintiffs' and/or the

25 Stronach Group's purported damages in this action; and

26 • Documents and communications regarding Plaintiffs' decision to file

27 this lawsuit.

28

1 **O. Derby Wars' Nineteenth Affirmative Defense – Injunctive Relief is**
2 **Discretionary**

3 1. IHA

4 a. Summary Statement of Defense

5 Even if Plaintiff could establish the elements of the violation of the UCL, in
6 light of all the relevant considerations, the Court can and should exercise its
7 discretion and decline to award injunctive relief.

8 b. Elements Required to Establish Defense

9 The elements Plaintiffs must establish to obtain permanent injunctive relief
10 for this claim are: (1) that Plaintiffs have suffered an irreparable injury; (2) that
11 remedies available at law, such as monetary damages, are inadequate to compensate
12 for that injury; (3) that, considering the balance of the hardships between Plaintiffs
13 and Derby Wars, a remedy in equity is warranted; and (4) that the public interest
14 would not be disserved by a permanent injunction. *La Quinta Worldwide LLC v.*
15 *Q.R.T.M., S.A. de C.V.*, 762 F.3d 867, 879 (9th Cir. 2014); *Allergan, Inc. v. Athena*
16 *Cosmetics, Inc.*, No. SACV071316 JVS RNBX, 2013 WL 12142655, at *2 (C.D.
17 Cal. Mar. 6, 2013).

18 c. Key Evidence in Support of Defense

19 The following is a representative (not an exhaustive) list of key evidence that
20 Derby Wars will use to prove its affirmative defense at trial:

21 • Testimony of Mark Midland;
22 • Testimony of Michael Shutty;
23 • Testimony of Scott Daruty;
24 • Testimony of Timothy Ritvo;
25 • Testimony of Michael Rogers;
26 • Testimony of John Ford;
27 • Testimony of Michael Calderone;
28 • Testimony of Rick Baedeker;

- 1 • Testimony of Randal Heeb, Ph.D.;
- 2 • The Corrected Expert Report of Randal Heeb, Ph.D.;
- 3 • Plaintiffs' responses to interrogatories;
- 4 • Documents and communications between Plaintiffs' and the Stronach
- 5 Group's representatives and agents, on the one hand, and Derby Wars'
- 6 representatives and agents, on the other hand, regarding business
- 7 dealings and relationships with Plaintiffs and the Stronach Group;
- 8 • Documents and communications between Plaintiffs' and the Stronach
- 9 Group's representatives and agents, on the one hand, and Derby Wars'
- 10 representatives and agents, on the other hand, regarding cross
- 11 marketing efforts between Plaintiffs and Derby Wars;
- 12 • Documents and communications between Plaintiffs and Derby Wars,
- 13 internally amongst Plaintiffs, between Plaintiffs and the Stronach
- 14 Group, and between Plaintiffs and third parties, evidencing that despite
- 15 their awareness of Derby Wars' fantasy horse racing contests as early
- 16 as September 2011, Plaintiffs never objected to Derby Wars' conduct
- 17 prior to the filing of this action;
- 18 • Documents and data establishing the positive impact of fantasy horse
- 19 racing contests on tracks' pari-mutuel handle (*e.g.*, BetAmerica's
- 20 assessment of data regarding the effect of BetAmerica's contests on
- 21 Gulfstream and Santa Anita Pari-Mutuel Results).
- 22 • Documents regarding the financial aspects of Derby Wars' contests
- 23 and revenues;
- 24 • Documents regarding wagering on horse racing and operation of
- 25 Plaintiffs' racetracks;
- 26 • Plaintiffs' licenses to operate race tracks and accept wagers on horse
- 27 races;
- 28 • Plaintiffs' agreements with the horsemen's groups and host race states;

- 1 • Documents and communications regarding Plaintiffs' and/or the
2 Stronach Group's business dealings and agreements with other fantasy
3 horse racing and/or handicapping contest sites;
- 4 • Documents regarding the financial aspects of Plaintiffs' and/or the
5 Stronach Groups' business dealings and agreements with other fantasy
6 horse racing and/or handicapping contest sites;
- 7 • Documents and communications regarding Plaintiffs' interactions with
8 state horse racing boards and commissions and state legislatures,
9 including specifically the CHRB;
- 10 • Documents and communications regarding Plaintiffs' and/or the
11 Stronach Group's purported damages in this action; and
- 12 • Documents and communications regarding Plaintiffs' decision to file
13 this lawsuit.

14 2. UCL

15 a. Summary Statement of Defense

16 Even if Plaintiff could establish the elements of the violation of the UCL, in
17 light of all the relevant considerations, the Court can and should exercise its
18 discretion and decline to award injunctive relief.

19 b. Elements Required to Establish Defense

20 The elements Plaintiffs must establish to obtain permanent injunctive relief
21 for this claim are: (1) that Plaintiffs have suffered an irreparable injury; (2) that
22 remedies available at law, such as monetary damages, are inadequate to compensate
23 for that injury; (3) that, considering the balance of the hardships between Plaintiffs
24 and Derby Wars, a remedy in equity is warranted; and (4) that the public interest
25 would not be disserved by a permanent injunction. *La Quinta Worldwide LLC v.*
26 *Q.R.T.M., S.A. de C.V.*, 762 F.3d 867, 879 (9th Cir. 2014); *Allergan, Inc. v. Athena*
27 *Cosmetics, Inc.*, No. SACV071316 JVS RNBX, 2013 WL 12142655, at *2 (C.D.
28 Cal. Mar. 6, 2013).

c. Key Evidence in Support of Defense

The following is a representative (not an exhaustive) list of key evidence that Derby Wars will use to prove its affirmative defense at trial:

- Testimony of Mark Midland;
- Testimony of Michael Shutty;
- Testimony of Scott Daruty;
- Testimony of Timothy Ritvo;
- Testimony of Michael Rogers;
- Testimony of John Ford;
- Testimony of Michael Calderone;
- Testimony of Rick Baedeker;
- Testimony of Randal Heeb, Ph.D.;
- The Corrected Expert Report of Randal Heeb, Ph.D.;
- Plaintiffs' responses to interrogatories;
- Documents and communications between Plaintiffs' and the Stronach Group's representatives and agents, on the one hand, and Derby Wars' representatives and agents, on the other hand, regarding business dealings and relationships with Plaintiffs and the Stronach Group;
- Documents and communications between Plaintiffs' and the Stronach Group's representatives and agents, on the one hand, and Derby Wars' representatives and agents, on the other hand, regarding cross marketing efforts between Plaintiffs and Derby Wars;
- Documents and communications between Plaintiffs and Derby Wars, internally amongst Plaintiffs, between Plaintiffs and the Stronach Group, and between Plaintiffs and third parties, evidencing that despite their awareness of Derby Wars' fantasy horse racing contests as early as September 2011, Plaintiffs never objected to Derby Wars' conduct prior to the filing of this action;

- 1 • Documents and data establishing the positive impact of fantasy horse
2 racing contests on tracks' pari-mutuel handle (*e.g.*, BetAmerica's
3 assessment of data regarding the effect of BetAmerica's contests on
4 Gulfstream and Santa Anita Pari-Mutuel Results).
- 5 • Documents regarding the financial aspects of Derby Wars' contests
6 and revenues;
- 7 • Documents regarding wagering on horse racing and operation of
8 Plaintiffs' racetracks;
- 9 • Plaintiffs' licenses to operate race tracks and accept wagers on horse
10 races;
- 11 • Plaintiffs' agreements with the horsemen's groups and host race states;
- 12 • Documents and communications regarding Plaintiffs' and/or the
13 Stronach Group's business dealings and agreements with other fantasy
14 horse racing and/or handicapping contest sites;
- 15 • Documents regarding the financial aspects of Plaintiffs' and/or the
16 Stronach Groups' business dealings and agreements with other fantasy
17 horse racing and/or handicapping contest sites;
- 18 • Documents and communications regarding Plaintiffs' interactions with
19 state horse racing boards and commissions and state legislatures,
20 including specifically the CHRB;
- 21 • Documents and communications regarding Plaintiffs' and/or the
22 Stronach Group's purported damages in this action; and
- 23 • Documents and communications regarding Plaintiffs' decision to file
24 this lawsuit.

25 **III. IDENTIFICATION OF ANTICIPATED EVIDENTIARY ISSUES**

26 The parties exchanged draft exhibit lists on May 12, 2017. The parties
27 exchanged updated and amended exhibit lists on May 19, 2017. The parties have
28 prepared a draft Joint Exhibit List as required by Local Rule 16-6.1, which they will

1 submit to the Court on May 26, 2017. The parties agreed to meet and confer further
2 to discuss objections to proposed exhibits, as well as stipulations to authenticity and
3 admissibility of proposed exhibits, by the deadlines set forth by the Court.

4 During the parties' Local Rule 16-2 meeting of counsel, the parties agreed
5 that Plaintiffs will provide Derby Wars with a list of proposed facts about which
6 Plaintiffs believe there is no dispute. Derby Wars will review this list and inform
7 Plaintiffs of any facts to which it will stipulate. Additionally, Derby Wars will set
8 forth any additional facts for proposed stipulation. Derby Wars has proposed that
9 the parties stipulate to alter the timing of the Local Rule 16.3 requirement regarding
10 demonstrative exhibits and illustrative material. Plaintiffs have not agreed to alter
11 the timing of Local Rule 16.3 at this time.

12 Derby Wars filed four motions *in limine*, which relate to the following
13 evidentiary issues:

14 (a) A *Daubert* motion challenging the expert testimony of Plaintiffs'
15 purported damages expert, David Tantlinger. For the reasons set forth in the
16 pending motion, Mr. Tantlinger's testimony should be excluded from trial. (Docket
17 No. 92.)

18 (b) A motion seeking to prohibit Plaintiffs from presenting any evidence,
19 eliciting any testimony, or making any arguments or comments regarding monetary
20 damages. For the reasons set forth in the pending motion, all evidence regarding
21 monetary damages should be excluded from trial. (Docket No. 93).

22 (c) A motion seeking to prohibit Plaintiffs from presenting any evidence,
23 eliciting any testimony, or making any arguments or comments regarding any
24 criminal law or statute, including, without limitation, 18 U.S.C. § 1084, 18 U.S.C. §
25 1955, California Penal Code § 337a, or any other federal or state criminal law or
26 statute. (Docket No. 94.)

27 (d) A motion seeking to prohibit Plaintiffs from presenting any evidence,
28 eliciting any testimony, or making any argument or comment regarding third party

1 legal opinions, including, without limitation, legal opinions by counsel; opinions,
2 statements or communications of Derby Wars' employees or representative or non-
3 parties regarding the legality of Derby Wars' contests; state attorney's general
4 opinions regarding the legality of daily fantasy sports; and state regulations
5 regarding the legality of daily fantasy sports. (Docket No. 95.)

6 Plaintiffs also filed three motions *in limine*. (See Docket Nos. 89, 90, 91.)
7 For the reasons set forth in the forthcoming opposition briefs that will be filed by
8 Derby Wars, Plaintiffs' motions should be denied in their entirety. Plaintiffs
9 improperly seek to use those motions *in limine* to exclude evidence that is highly
10 relevant to the affirmative defenses and issues to be tried.

11 Derby Wars reserves the right to seek to exclude evidence based on
12 evidentiary issues that may arise at trial, as well as evidentiary issues that may arise
13 from the parties' further meet and confer efforts and after Derby Wars' review of
14 Plaintiffs' Memorandum of Contentions of Fact and Law.

15 **IV. IDENTIFICATION OF ANTICIPATED LEGAL ISSUES**

16 As set forth above, the Court should decide the legal issues raised by the
17 parties' respective motions *in limine*. Derby Wars reserves the right to address
18 additional legal issues as they arise, including based on further meet and confer
19 efforts and after Derby Wars reviews Plaintiffs' Memorandum of Contentions of
20 Fact and Law. Derby Wars further expressly reserves its right to move for
21 judgment as a matter of law.

22 **V. BIFURCATION OF ISSUES**

23 Neither party has moved to bifurcate any of the issues in this matter. Derby
24 Wars has no objection to trying all issues of the case together.

25 **VI. JURY TRIAL**

26 Plaintiffs and Derby Wars each timely demanded a jury trial. With the
27 exception set forth below, it is Derby Wars' position that all remaining issues in
28 this litigation are triable to a jury, including Derby Wars' affirmative defenses. *See*

1 *Cortez v. Puralator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 179-181 (2000)
2 (holding that equitable defenses may be asserted as a defense to a UCL remedy);
3 *see also Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S.Ct. 1962, 1977 (2014)
4 (holding that equitable defenses may be brought against actions at law). However,
5 Derby Wars maintains that the scope and entitlement to injunctive relief should be
6 expressly reserved for the Court, and should not be decided by a jury.

7 **VII. ATTORNEYS' FEES**

8 It is Derby Wars' position that Plaintiffs are not entitled to attorneys' fees.
9 There is no provision for the awarding of attorneys' fees under either the IHA or
10 UCL.

11 **VIII. ABANDONMENT OF ISSUES**

12 As set forth in Derby Wars' motion *in limine* regarding the Criminal Statutes,
13 Plaintiffs should be judicially estopped from asserting any issues or claims
14 regarding such statutes. Further, Derby Wars will not pursue its First, Second,
15 Fourth, Sixth, or Eighth Affirmative Defenses⁴ as stand-alone "affirmative
16 defenses" *per se* at trial, as such defenses are subsumed within other defenses or
17 otherwise highlight elements of Plaintiffs' claims for which they will not be able to
18 sustain their burden of proof. Derby Wars will present evidence in support of its
19 remaining defenses and to establish that Plaintiffs have failed to prove the elements
20 of their claims and carry their burdens of proof; even if they have done so, they
21 have not proven the damages they seek. If necessary, Derby Wars will also brief
22 any issues relating to costs after trial.

23 //

24 //

25 //

26 //

27

⁴ Derby Wars' First, Second, Fourth, Sixth, and Eighth Affirmative Defenses are
28 for failure to state a claim, failure to plead claims with required specificity, laches,
no damages, and good faith, respectively. (Docket No. 34.)

1 Further, based on the parties' discussions at the meeting of counsel, the
2 parties intend to continue discussions leading up to trial regarding any claims,
3 defenses, or issues that either side is willing to abandon and/or as to which they
4 may stipulate prior to trial.

5

6 Dated: May 26, 2017

Respectfully submitted,

7 MANATT, PHELPS & PHILLIPS, LLP
8 Matthew P. Kanny
Arunabha Bhoumik
9 Maura K. Gierl

10

By: /s/ Matthew P. Kanny

11 Matthew P. Kanny

Attorneys for Defendant

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